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Supreme Court, U.S.
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In the
Supreme Court of the United States

GREGORY BURRIS,

Petitioner,

vs.

JERRY HILL,

Respondent .

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For many years, the State Attorney for Florida's Tenth Judicial Circuit has used that state's racketeering statute – and the threat of long prison sentences – to prevent the sale of practically all sexually explicit material in the three-county Circuit. As a result, there is not now, and for several years there has not been, a single store in the entire circuit selling that material. Many items that are clearly not obscene are nevertheless unavailable to the residents and visitors to any county in the circuit because of the self-censorship of store operators. The questions presented by this Petition are:

I. Does the First Amendment allow a prosecutor to repeatedly use a state RICO statute to intimidate all sellers of sexually explicit material into self-censorship, and prevent the sale of all adult oriented material in the jurisdiction?

II. Does the First Amendment allow a prosecutor to prevent the establishment of contemporary community standards by use of a state RICO statute, and then prosecute individuals under obscenity statutes that require the application of those non-existent standards?

PARTIES TO THE PROCEEDING

The Petitioner is Gregory Burris, the Plaintiff in the District Court and the Appellant in the Eleventh Circuit. The Respondent is Jerry Hill, the elected State Attorney for Florida's Tenth Judicial Circuit. Hill was the Defendant in the District Court and the Appellee in the Court of Appeals.

All parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for the Petitioner states that both parties to this Petition are natural persons.

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The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at Appendix A to this Petition. The unreported opinion of the United States District Court for the Middle District of Florida is reproduced at Appendix B.

JURISDICTION

The Court of Appeals entered its judgment and opinion on December 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . .

Statutory provisions

Appendix C to the Petition includes selected excerpts from the Florida Statutes that are pertinent to the Questions Presented. Those statutes include the state's Racketeer Influenced and Corrupt Organizations Act (Chapter 895), the obscenity statute (Chapter 847)[1] and the statutes establishing the penalties for violations of those laws (Chapter 775).

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1 Obscenity is a RICO predicate offense.

STATEMENT OF THE CASE

Following the lead of the United States Congress, the State of Florida enacted Chapter 895 of the Florida Statutes, titled "Florida's RICO (Racketeer Influenced and Corrupt Organization) Act." Violations of Florida's obscenity law, chapter 847 of the Florida statutes, are predicate offenses. While obscenity violations are generally prosecuted as first degree misdemeanors, carrying a maximum penalty of one year in a county jail, RICO prosecutions are serious felonies, exposing violators to many years in state prison.[2]

At the trial level, Florida is divided into 20 judicial circuits. The chief prosecuting attorney, elected by voters every four years, is the State Attorney. He or she has total discretion over what offenses are charged and prosecuted in the circuit.

Florida's Tenth Judicial Circuit is a three-county circuit in the center of the state. The three counties are Polk, Highlands and Hardee. Of the three, Polk County is by far the largest. Its most populated city is Lakeland, a community of almost 90,000 people, between Orlando and Tampa. Polk County has a substantial agricultural industry, but Lakeland is fairly cosmopolitan. The County is fairly large, occupying about 2,000 square miles, with a county-wide population of approximately 500,000.

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2 It would appear to one unfamiliar with Florida's sentencing guidelines that a violation of the RICO statute would call for a prison term of 30 years, with an additional 30 years for a RICO conspiracy conviction. But it is impossible to know what sentencing range would be available to a trial judge under the guidelines.

Highlands County is considerably smaller that Polk County, occupying just over 1,000 square miles. Highlands County is primarily agricultural, and is part of Florida's rich citrus and beef cattle industries. Its population is approximately 88,000 and its largest city – Sebring – is home to about 11,000 people. While Highlands County is far less cosmopolitan than Polk County, it has a general commercial environment, with malls, theaters, restaurants and typical commercial activity.

The smallest of the three counties, Hardee County is a rural county between Polk County to the north and Highlands County to the southeast. Hardee County's population is only 27,000, and the County has a very limited commercial area.

Jerry Hill is the elected State Attorney in the Tenth Circuit. He has held that office continuously since 1985. He has total discretion as to what offenses are charged and prosecuted in the three counties.

Hill has had an unusual approach to the sale and distribution of sexually explicit materials in his circuit. Ordinarily, contemporary community standards are established in the marketplace, subject to review by jurors in obscenity prosecutions. Over the years, most counties in Florida have established their own community standards through this process. However, that process has been thwarted in the Tenth Circuit by its State Attorney. As the Record below demonstrated, the "standards" by which sexually explicit material is judged in the Tenth Circuit are Hill's own *personal* standards.

Like all counties in Florida (and presumably like all counties in the United States), there is a commercial market for sexually explicit material in the three counties in the Tenth Circuit. Over the years, entrepreneurs have attempted to reach that market by offering sexually explicit materials for sale and rental to residents of and visitors to the three counties.[3]

Jerry Hill was determined to see that there was *no* market for sexually explicit materials in his jurisdiction. His plan was simple. Purchase materials, get probable cause findings, and charge RICO violations. The intimidation of the RICO penalties would surely convince any rational defendant to accept a plea offer.

A typical case involved three individuals who were charged with operating two stores in Polk County, one in Lakeland, the other in Davenport. In 1994, police officers purchased numerous items from the stores. Complying with this Court's mandate in *Roaden v. Kentucky,* 413 U.S. 496 (1973), they took the items to local judges for probably cause determinations. Then, armed with arrest warrants, the officers took Myron Ace, Michael Maleta and Dean Hawkins into custody. Bonds were outrageously high.[4] Each Defendant was charged with RICO and RICO conspiracy, in addition to many predicate obscenity charges.

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3 Actually, the only attempts at selling sexually explicit material have apparently been in Polk County. Apparently, no one has had the temerity to try to open an adult video store in either Highlands or Hardee Counties.

4 Myron Ace recalled his bond being $250,000.

Faced with many years in prison, the Defendants were relieved to hear an offer from the State of Florida for a resolution of the cases that would not result in any prison sentences. Plea agreements were reached and signed. The State agreed to drop all charges against each of the individuals, and they agreed to (1) close the businesses and (2) never again operate an adult entertainment business in any county in the Tenth Judicial Circuit.

Keeping its promise, the State dropped all charges against the individual Defendants. But as the Notice of Nolle Prosequi in *State v. Ace, et al.* shows, the RICO hammer was left hanging over their heads:

> Bradford H. Copley, as Assistant State Attorney, gives notice that the above-styled cause is hereby TERMINATED AND DISMISSED for the following principal reason, to-wit:
>
> > THE STATE WILL RE-FILE AN INFORMATION CHARGING THE TWO CORPORATIONS INVOLVED. THE CORPORATIONS HAVE AGREED TO CLOSE THE OFFENDING STORES AND PAY INVESTIGATIVE COSTS TO THE POLK COUNTY SHERIFF'S DEPARTMENT. THE STATE WILL RE-FILE CRIMINAL CHARGES AGAINST THE ABOVE INDIVIDUALS SHOULD THEY AGAIN ENGAGE IN SIMILAR BUSINESS IN THIS JURISDICTION.

This was typical of the attack by Hill on any seller of sexually explicit material in his Circuit. In 1992, Hill charged Dominick Ciano and several employees with RICO, RICO conspiracy and obscenity violations. Huge bonds were set, and the Defendants were told that they could receive up to 30 years in prison on both the RICO and the RICO conspiracy charges. They opted, instead, for the State's plea offer: close the business and never re-open in the Tenth Circuit, and all charges against them would be dropped. In 1996, RICO and RICO conspiracy charges were filed against Scott Nelson, John Shea and Thomas Arnone. They closed their store, agreed never to sell sexually explicit material in the Circuit again, and the charges were dropped. That same year, the same weapons were used by Hill to drive Gerald Florand out of business. In 1997, Norris Riggs was driven out of business with a RICO charge.[5] In 1998, 71 year-old Robert Gluck and his 70 year-old wife, Marilyn, were arrested and subsequently forced out of business. In addition to agreeing never to sell adult materials in the Circuit again, they also had to place a deed restriction on their property preventing it from being used as an adult entertainment business in the future. That same year, Ronald Brown and Jeffrey Parker were charged with RICO and RICO conspiracy and forced to close. They also were required to agree that they would never do business again in the Tenth Judicial Circuit.

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5 Riggs was the only store operator in the past 12 years who was only charged with RICO, and not RICO conspiracy, in one of these cases. That is because Riggs was a sole proprietor with no employees, so the State was unable to find anyone else to charge.

Since 1998, no one has operated an adult bookstore or adult video store in the Circuit.[6] Using RICO as his sword, Hill has carved a huge path through the First Amendment. Presumptively protected materials are not available in Jerry Hill's jurisdiction. And the "contemporary community standards" in the Tenth Circuit are actually Hill's personal standards. He has single-handedly prevented the community from establishing its own community standards, as this Court outlined in *Miller v. California*, 413 U.S. 15 (1973). As of the date of the filing of this Petition, the most "daring" sexually explicit publication available for sale in the entire circuit is *Playboy*.[7]

Gregory Burris wanted to open an adult video store in Polk County. Fearful of being targeted for a RICO prosecution, he filed suit in the United States District Court for the Middle District of Florida in an attempt to prevent that likelihood. Burris asked the District Court to hold that Hill could not constitutionally use Florida's RICO law to completely suppress the market for sexually explicit videotapes.

Burris was rebuffed by the courts below. Rejecting his claim that Hill's tactics chilled free speech, the District Court granted Hill's motion for summary judgment. The Court said that "only those individuals who actually

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6 The State has not limited its attack to traditional stores. In 1998, Richard Vilaro was forced out of business with a RICO prosecution, and his business was only operated as a website.

7 Attorneys arguing on Hill's behalf in this case told the courts below that Hill "allows" the sale of *Playboy* in the circuit, in response to Burris' claim that no sexually explicit material could be sold without a resulting RICO prosecution.

violated Florida's obscenity laws have been prosecuted by Defendant." App. A-11. The District Court paid no attention to the fact that no publication or video was *ever* found obscene by a jury, because no defendant was willing to risk a long prison sentence by going to trial. The District Court concluded that since a judge had found *probable cause* to believe the materials for which the many defendants faced RICO prosecutions were obscene, that was sufficient. The District Court never confronted the issue of how a judge could find probable cause with no contemporary community standards.[8]

In a very brief unpublished opinion, a 3-judge panel of the United States Court of Appeals for the Eleventh Circuit agreed. That Court simply adopted the opinion of the District Court.

This Petition followed.

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8 Obviously, a finding of probable cause is just that – probable cause. It is certainly not determinative of the ultimate factual issue, and is not even binding in a later challenge to the probable cause determination itself. *See, e.g., Groh v. Ramirez*, ___ U.S. ___, 2004 WL 330057 (February 24, 2004).

REASON FOR GRANTING THE WRIT

For many decades this Court has recognized the right of adults to choose their own reading and viewing materials. In *Miller v. California*, the Court directed local communities as to how materials were to be judged obscene or not obscene. The Court established a now famous three-part test that must be used in a criminal prosecution for obscenity.[9] Applying that test, the trier of fact must first find, beyond and to the exclusion of any reasonable doubt, that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.[10]

There would not seem to be any way to artificially establish contemporary standards. In this writer's experience and opinion, those standards are established over time, as juries determine whether certain materials brought before them are obscene under *Miller*. As police and prosecutors get a sense of what local juries will and will not accept, the standards of the community are developed. Theoretically, one who would sell sexually explicit material in any county might be able to determine that "line" which cannot be crossed.[11]

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9 This Petition does not discuss child pornography, which is a separate category of materials subject to its own tests. *See New York v. Ferber*, 458 U.S. 747 (1982),

10 In Florida the "contemporary community" is the county in which the material is sold or exhibited. *Johnson v. State*, 351 So.2d 10 (Fla. 1977).

11 This approach is theoretical only. In the real world, no such determination is ever possible. It depends on the whims of the police,

(continued...)

Of course, the community standards must be "contemporary." This prong of *Miller* assumes, as common sense tells us, that community standards will evolve. Bathing suits that allowed women to expose their legs would have brought criminal prosecutions a century ago. Today, many bathing suits that are acceptable as beach wear are made from less material than a gentleman's handkerchief.[12]

Nevertheless, those who would sell sexually explicit materials anywhere in Florida must be aware of "contemporary community standards." While those standards are certainly going to be different in Miami and Sebring, the law supposes that there are standards in every county. It is this supposition that brings about the conflict between Greg Burris and Jerry Hill.

11(...continued)
the personal predilections of the prosecutor who happens to hold office at the time, and the six county residents selected for a particular jury. Two juries, sitting in two cases in the same courthouse on the same day and judging the same book or film, might reach completely opposite conclusions, one finding the material obscene and the other finding the *identical* book or movie not obscene. In reality, *Miller*'s "contemporary community standards" test is completely unworkable and of little use in deciding obscenity issues.

12 It would be fruitless to engage in any discussion about whether these changes are "good or bad" for society. They are what society has established. They are what they are.

The hypothetical chilling effect in *Fort Wayne Books* is not hypothetical in Florida's Tenth Judicial Circuit.

When this Court decided *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), it rejected the claim that the use of Indiana's RICO statute with obscenity charges as the predicate offenses caused an intolerable chilling effect on free speech. The Court said, "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional under our precedents." 489 U.S. at 60. The Court did not have evidence before it of significant self-censorship, but was responding to the argument advanced by Fort Wayne Books that self-censorship was the inevitable result of the draconian penalties of the RICO statutes.[13]

The chilling effect in Florida's Tenth Circuit is all too real. Sellers of adult material, fearful of long prison sentences and huge fines for merely distributing sexual fare to a willing adult audience, are avoiding the Tenth Judicial Circuit.[14] Every bookseller that has opened in the Circuit in the last 14 years has been arrested, charged with RICO, and closed. No one else will even open.

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13 Those penalties are certainly not draconian when applied in the way the statute was originally intended by Congress to be applied. RICO was enacted to reach the criminal activities of crime lords and major criminal enterprises. But when used against small retailers of books and movies, lengthy prison sentences can only be considered draconian, reminiscent of Draco's legislation in ancient Greece, in which the punishment for both serious and trivial crimes was death.

14 Obviously, Hill has accomplished exactly what he wanted, to completely suppress the distribution of *all* sexually explicit material, obscene and non-obscene, in his Circuit.

Jerry Hill has done exactly what this Court suggested could not be done; he has successfully chilled the speech of all who would sell sexually explicit material in his circuit. Actually, he has not chilled it. He has frozen it solid. That was not what this Court meant in *Fort Wayne Books*.

The District Court opinion misapplied this Court's *Miller* test by allowing one person to arbitrarily determine the community standards of the entire population of three Florida counties.

When this Court decided *Miller v. California*, the Court established a three-prong test to determine whether any particular book or movie was obscene. Of critical importance, and recognizing that suppression of controversial materials cannot be left in the hands of government officials, the Court left that determination to juries. The first task of a reviewing jury is to determine the contemporary standards of the community. Without those standards, it would be impossible to know how the average person in the community would feel about the materials.

Miller has no meaning in Florida's Tenth Circuit. First, no jury will ever get to see materials, because Hill's scheme effectively intimidates sellers into quickly "throwing in the towel." While one might be willing to risk a conviction for obscenity, carrying a penalty of no more than a year in a county jail (and a much more likely sentence of probation and a small fine), one would be foolhardy indeed to risk many years of his life and financial ruin by insisting on letting a jury decide his fate. Indeed, the first prong of *Miller* has been rewritten in the

Tenth Circuit. A jury in the Circuit must now find, beyond any reasonable doubt, that "to the average person, applying State Attorney Hill's standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." And how would a jury know what Prosecutor Hill's standards are? Simple. They would be told what they are by the assistant state attorney prosecuting any individual case, in his closing argument. Because in the complete absence of any standards, the government is free to create its own, giving censorship free and unbridled rein.

Was that what the Court meant when it decided *Miller*? Did the Court even hint that a prosecutor could artificially suppress the standards of the community and, instead, impose his own personal standards on all who lived and visited there? Of course not. And it is the unconstitutional linking of Florida's obscenity statute to its RICO provisions that has ended sexually explicit speech in the Circuit.[15]

Unless this Court recedes from its holding in *Fort Wayne Books*, and prohibits future use of RICO with

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15 Lest the Court think this is a unique situation, it is not. In Florida's Second Circuit, the State Attorney – Willie Meggs – is a devout practitioner of Christianity who has ceaselessly used his prosecutorial authority to prevent any adult entertainment businesses from opening and operating in the six counties in his Circuit. While some will certainly applaud his successes, it makes a mockery of the First Amendment's guarantee of the right to freedom of expression.

Gregory Burris suspects that if one had the time and resources to do an in-depth national survey, one would find many such pockets where sexually explicit expression have been completely suppressed by zealous prosecutors armed with the weapon of RICO.

obscenity charges, *Miller* will have no meaning when censorial prosecutors set out to eliminate all sexually explicit material from their jurisdictions.

Previous probable cause findings were presumably invalid, because there were no "contemporary community standards" on which to base those findings.

The District Court placed great emphasis on findings of probable cause made by local judges before any RICO obscenity prosecutions were instituted. But because of Hill's tactics in forcing all sellers of sexually explicit materials to cease doing business in the Tenth Circuit, there was no way to make a probable cause finding. Each of the individuals who tried to sell or rent sexually explicit material in the Tenth Circuit over the past two decades was charged with RICO and two or more obscenity offenses. The obscenity charges were first degree misdemeanors, exposing those arrested to a year in jail. But the RICO charge – and the conspiracy count that almost always accompanied it – were significantly more serious. Florida's RICO statute carries a maximum penalty of thirty years in prison, with another 30-year sentence for the companion RICO conspiracy charge.[16] Faced with those horrendous sentencing possibilities, every one of those people quickly decided that it was wiser to abandon the fight.

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16 Under Florida's sentencing guidelines, an individual convicted of both RICO and RICO conspiracy would not be sentenced to 60 years in prison under all but the most unusual circumstances. However, the guidelines would establish a sentencing range that would require a state prison term of some years.

Thus, there have been no jury trials in any obscenity case in many years in the Tenth Circuit. Although judges in the RICO cases filed by Hill had found probable cause prior to the charges being instituted, one must question how that was done, since there were no community standards.

CONCLUSION

Fifteen years ago, the Court rejected a claim by a bookseller in Indiana that the use of obscenity as a RICO predicate offense would cause great self-censorship for fear of the enormous penalties those RICO statutes carried. The Court said that "perhaps . . . some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves." *Fort Wayne Books*, 489 U.S. at 60.

When the Court decided *Fort Wayne Books*, it based its opinion on a mere "assertion" of self-censorship. But those Fort Wayne Books chickens have certainly come home to roost. "Some cautious booksellers" now are *all* booksellers in Florida's Tenth Circuit. "Some tendency to self-censorship" is now a complete removal of all sexually explicit materials from the bookshelves in the three-county circuit. "Some inhibitory effect" is, in effect, a massive book-burning bonfire in *at least* three Florida counties. More than 600,000 residents in those counties, and countless visitors, have no right to purchase or rent sexually explicit materials from any store in the entire Tenth Circuit.

This Court must recede from *Fort Wayne Books*.[17] It must stop the government from attaching obscenity charges to RICO statutes, by holding that such an assault causes an unconstitutional chilling effect on sexual speech. The danger to protected expression is too great.

Respectfully submitted,

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17 Actually, the Court should overrule that decision. It has been perverted by overzealous prosecutors to make the sale of sexually explicit materials far too risky to chance.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11134

D.C. Docket No. 99-01308-CV-T-27-EAJ

GREGORY BURRIS,
d.b.a. Video Plus,

Plaintiff-Appellant,

versus

JERRY HILL,
State Attorney for the Tenth Judicial Circuit of Florida,

Defendant-Appellee.

(December 16, 2003)

Before TJOFLAT, HULL and FAY, Circuit Judges.

HULL, Circuit Judge:

After review and oral argument, we affirm the district court's order granting Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment for the reasons outlined in the district court's thorough and well-reasoned order dated January 29, 2003.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GREGORY BURRIS,

Plaintiff(s),

vs.

Case Number
8:99-C V-1308-T-27EAJ

JERRY HILL, State Attorney for the Tenth Judicial Circuit of Florida,

Defendant(s). /

ORDER

BEFORE THE COURT is Plaintiffs Motion for Summary Judgment (Dkt. 32) and Defendant's Motion for Summary Judgment (Dkt. 44). Oral argument was presented to the Court on January 9, 2003. Upon consideration, Plaintiffs motion will be DENIED and Defendant's motion will be GRANTED.

Plaintiff, who owned a video sales and rental store in Polk County, Florida brought this action seeking declaratory and injunctive relief against Defendant, the State Attorney for the Tenth Judicial Circuit of Florida, which includes Polk County. Plaintiff seeks a declaratory judgment ". . . declaring the constitutionality of the Florida RICO Act when used in conjunction with the Florida obscenity law". (Dkt. 17, Count One). Plaintiff also seeks permanent injunctive relief, seeking to enjoin

Defendant ". . . from enforcing against BURRIS The Florida RICO Act when the Florida obscenity law is used as the predicate offense." (Dkt. 17, Count Two, ¶ 27).

In 1998, Plaintiff began operating a retail video tape sales and rental business in Lakeland, Polk County, Florida. He wanted to use a portion of his store to sell adult oriented video tapes. He alleges that he refrained from selling those tapes out of fear of being prosecuted by Defendant under Florida's RICO Act. Ultimately, Plaintiff closed his store. He contends that he was compelled to close his store because his income was insufficient to cover overhead which he believed was because he refrained from selling or renting adult videos. (Burns Affidavit, (Dkt. 36, ¶ 1, 3)). Plaintiff contends that Defendant's use of Florida's RICO Act in conjunction with Florida's obscenity statute (Fla. Stat. ch. 847) violates his First and Fourteenth Amendment rights, arguing that the RICO Act's enhanced penalties "creates a chilling effect on presumptively free speech." According to Plaintiff:

> "The severity of the RICO Act's penalties coupled with the vagueness of the Florida obscenity statute creates a chilling effect and constitutes an unlawful prior restraint on protected speech in violation of the First and Fourteenth Amendments to the United States Constitution."

(Plaintiff's Motion for Summary Judgment (Dkt. 32, p. 2, ¶6))

Plaintiff challenges the facial constitutionality of Florida's obscenity statute, Fla. Stat. ch. 847, specifically

the definition of "obscene" in § 847.001(10).[1] Plaintiff concedes that the statute's definition of "obscene" *"unquestionably comports with the United States Supreme Court's definition in Miller v. California. 413 U.S. 15(1973)."* Notwithstanding this concession, Plaintiff argues that the definition is "nonetheless rife with 'inherent residual vagueness.' " (Dkt. 32, p. 7). Plaintiff urges that various words and phrases within the definitional language of the Florida obscenity statute are so vague that a video store proprietor such as himself cannot determine contemporary community standards without conducting empirical study, cannot determine whether a particular video tape will appeal to "prurient" interests or otherwise accomplish "the impossible task of distinguishing between an illegal video tape that arouses shameful or morbid feelings on the one hand, and a legal videotape that sparks only healthy lust, on the other." (Dkt. 32 at p. 7). This argument has no merit.[2]

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[1] Section 847.001(10), Fla. Stat, provides:

> (10) "Obscene" means the status of material which:
>
> (a) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Section 847.001(16) defines "sexual conduct".

[2] To the extent Plaintiff contends that he cannot determine whether a particular tape would appeal to "prurient" interests, that term has been judicially construed by the Supreme Court in *Brockett v. Spokane Arcades. Inc.*, 472 U.S. 491, 498 (1985). Where a court has judicially construed terms in a statute by definition, the requirements of due

(continued...)

As Defendant correctly argues, states are presumed to have acted constitutionally in passing laws and economic and social legislation is presumed valid if rationally related to a legitimate state interest. *Anthony v. Franklin County*, 799 F.2d 681 (11th Cir. 1986). One challenging the facial constitutionality of a statute bears the burden of proving that the law could never be constitutionally applied, whereas the party seeking to uphold a restriction on commercial speech against an as-applied challenge carries the burden of justifying the law. *Jacobs v. The Florida Bar*, 50 F.3d 901, 906, n. 20 (11th Cir. 1995).

In *Miller v. California*, 413 U.S. 15 (1973), the United States Supreme Court, after reiterating "that obscene material is unprotected by the First Amendment", established guidelines for the permissible scope of statutes designed to regulate materials which depict or describe sexual conduct. In addition to requiring that the sexual conduct be "specifically defined by the applicable state law, as written or authoritatively construed," the Court required:

> A state offense must also be limited to works which taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

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[2] (...continued)
process are satisfied since it provides an individual with sufficient notice of what conduct is proscribed. See *Ward v. Illinois*. 431 U.S. 767 (1977).

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, supra at 23.

As the Supreme Court determined, if a state law intended to regulate obscene material is limited in accordance with these guidelines, "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." *Id.* Importantly, the Supreme Court observed:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

413 U.S. at 27.

Given the pronouncement of the United States Supreme Court in *Miller v. California*, and that Florida's obscenity statute, § 847.001(10) defines what is "obscene" strictly in accordance with the guidelines and requirements of *Miller*, this Court concludes that Florida Statute § 847.011 is facially constitutional. The Supreme Court of Florida has likewise held § 847.011 constitutional and in conformity with the standards announced by the United States Supreme Court in *Miller*. *Rhodes v. State*, 283 So.2d 351 (Fla. 1973); *Johnson v. State*, 351 So.2d 10 (Fla. 1977); *see also P.A.B.. Inc. v. Stack*, 440 F. Supp. 937 (S.D. Fla. 1977).

Plaintiff contends that Defendant's use of Florida's RICO Act with its enhanced penalties creates a chilling effect on Plaintiffs First and Fourteenth Amendment rights. Violations of Florida's obscenity laws constitute misdemeanor offenses.[3] A conviction under Florida's RICO Act constitutes a first degree felony punishable by a maximum prison term of thirty years. *See* Fla. Stat. §§ 895.04(1); 775.082(3)(b) and 775.083(1)(b). The Florida RICO Act prohibits the use of a "pattern of racketeering activity" to either conduct or acquire an organization or enterprise. "Pattern of Racketeering Activity" is defined as engaging in two or more of a variety of crimes listed in the Act. *See* Fla. Stat. §895.02(4). One of the crimes listed is obscenity. *See* Fla. Stat. § 895.02(1)(a)35.

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[3] Florida Statute § 847.01 1(1)(a) provides that distribution of obscenity constitutes a first degree misdemeanor which is punishable by up to one year in prison pursuant to §§ 775.082(4)(a) and 775.083(1)(b). A second conviction under § 847.011(1)(a) is enhanced to a third degree felony, punishable by a maximum prison term of five years. Fla. Stat. § 847.01 1(1)(a); § 775.082(3)(b) and § 775.083(1)(c).

Plaintiff acknowledges the holding in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46(1989) in which the Supreme Court rejected virtually identical arguments directed toward the use of Indiana's RICO law against a defendant prosecuted for possession and distribution of obscene materials. In that case, the Supreme Court characterized that statutory challenge as:

> "Petitioner's next contention rests on the difference between the sanctions imposed on obscenity law violators and those imposed on convicted "racketeers": the sanctions imposed on RICO violators are so "draconian" that they have an improper chilling effect on First Amendment freedoms . . ."

489 U.S. at 59.

In rejecting that challenge, the Court, while recognizing that the RICO punishment was "obviously greater than that for obscenity violations", perceived no "constitutionally significant difference between the two potential punishments." The Court declined to place limitations on the state of Indiana "in resorting to various weapons in the armory of the law." 489 U.S. at 59-60. Accordingly, based on this authority, Plaintiff's challenge to the enhanced penalty provisions provided by Florida's RICO Act when used in conjunction with Florida's obscenity law must likewise be rejected.[4]

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[4] Under Florida's RICO statute, a conviction exposes a defendant to a maximum prison term of thirty years whereas a conviction under the Indiana statute exposes a defendant to a maximum period of

(continued...)

Plaintiff argues that Defendant's use of violations of Florida's obscenity law as predicate acts to support a prosecution under the Florida RICO Act in effect constitutes an invalid prior restraint *vis a vis* subsequent punishment. Plaintiff argues that those vendors like himself who fear or perceive the threat of a RICO prosecution and the potential of a thirty year sentence for distribution of obscene materials have necessarily been forced to close their establishments, rather than risk exposure to long prison sentences. He argues that "the inherent vagueness of the obscenity law in conjunction with the severe penalties RICO Act creates a chilling effect on presumptively protected speech." (Dkt. 32 at p. 16).

As to Plaintiff's contention that "the inherent vagueness of the obscenity law in conjunction with the severe penalties RICO Act creates a chilling effect on presumptively protected speech", that argument is foreclosed by *Miller v. California, supra* and *Fort Wayne Books. Inc. v. Indiana, supra*. As Plaintiff acknowledges, *Miller v. California* set the standard for facial validity of state obscenity laws and Florida's statute "unquestionably" meets those constitutional standards. As *Fort Wayne Books, Inc. v. Indiana* teaches, if the underlying obscenity statute is not unconstitutionally vague, a RICO statute which encompasses the obscenity law "cannot be

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[4] (...continued)
imprisonment of five years. Although the Court recognized that it had in the past upheld the constitutionality of statutes providing five and ten year prison terms for obscenity offenses, there is nothing in the Court's opinion to suggest that a particular maximum sentence would make a constitutionally significant difference between the underlying criminal obscenity statutes and the enhanced penalties under a state's RICO law. Instructive is the Court's declination "to limit the state in resorting to various weapons in the armory of the law." 489 U.S. at 60.

vague either." 489 U.S. at 58.

Finally, in support of his contention that Defendant's use of Florida's RICO Act to prosecute individuals who sold sexually explicit or adult content materials unconstitutionally chills those individual's right to exercise protected speech, Plaintiff has submitted affidavits of individuals who have been prosecuted by Defendant in Polk County and the depositions of Defendant Hill and others involved in those prosecutions. While acknowledging the holding of the Supreme Court in *Fort Wayne Books, Inc. v. Indiana*, Plaintiff argues that he has presented more than the "mere assertion of some possible self censorship" resulting from Defendant's threat of prosecution under Florida's RICO law.[5]

Plaintiff s argument is not supported by the record. The evidence of record establishes that those individuals who have been prosecuted by Defendant and charged under Florida's RICO Act were formally charged with having violated Florida's obscenity law. In each instance, a controlled purchase was made from the individual's establishment and the purchased material was presented to a judge who made a threshold determination that the material violated Florida's obscenity laws. Only after that determination did Defendant bring or threaten formal charges under Florida's RICO Act. There is no evidence of record that an individual who sold only protected content materials was prosecuted or threatened with prosecution under Florida's RICO Act. That, in the course of plea

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[5] This argument is directed to the Supreme Court's statement that "the mere assertion of the possible self censorship resulting from the statute is not enough to render an anti-obscenity law unconstitutional under our precedents." 489 U.S. at 60.

bargaining, those individuals who were formally charged agreed to shut their businesses down, not to engage in the sale of sexually explicit or adult content materials in Polk County in the future and agreed to place deed restrictions on real property they own prohibiting the sale of such materials is nothing more than a consequence of having been arrested and/or charged with a serious criminal offense. The concessions agreed to by those individuals, to the extent that they included restrictions on the sale of protected speech, are incidental to the plea bargaining process which was triggered not by threats of prosecution for distribution of protected speech but by criminal prosecution under Florida's obscenity and RICO laws.

Plaintiff argues that he and the individuals who have closed their businesses actually engaged in self censorship out of fear of criminal prosecution and that this constitutes more than a "mere assertion of some possible self censorship" resulting frcm Defendant's prosecutorial activities. The fallacy of this argument is the simple recognition that only those individuals who actually violated Florida's obscenity laws have been prosecuted by Defendant. During oral argument, Plaintiff's counsel acknowledged that the record establishes that Defendant has not prosecuted individuals for distribution of non-obscene materials such as, for example, Playboy or Penthouse magazines. In other words, if an individual in Polk County violates Florida Statute § 847.001(10) and distributes obscene materials, that individual can expect to be prosecuted by Defendant, including the risk that Florida's RICO Act will be used. However, if those individuals distribute non-obscene materials, there is no showing that they will be or have been threatened with criminal prosecution.

Finally, to the extent Plaintiff and affiants contend that they are not able to determine what is "obscene" and therefore have either closed their businesses or removed all materials with adult content to avoid the risk of criminal prosecution and that this self censorship included or may have included removal of First Amendment protected materials, the Supreme Court has recognized that the deterrents of the sale of obscene materials "is a legitimate end of state anti-obscenity laws" and that "any form of criminal obscenity statute applicable to a book seller will induce some tendency to self censorship and have some inhibitory effect on the dissemination of material not obscene." 489 U.S. at 60, *citing Smith v. California*, 361 U.S. 147, 154-155 (1959).

In sum, Plaintiff cannot on the one hand acknowledge the constitutional validity of Florida's obscenity statute under the *Miller v. California* standard and on the other hand, continue to complain that he cannot determine what will be considered to be "obscene" in Polk County and as a result, complain that his First Amendment rights are chilled by the threat of criminal prosecution. Again, Plaintiff and those who desire to distribute sexually explicit or adult content must be guided, as is Defendant Hill in his prosecutorial endeavors, by the definitions contained in Fla. Stat. 847.001(10). There has been no showing in this record that Defendant has prosecuted or threatened to prosecute any individual under Florida's RICO Act for distribution of materials which do not meet the definition of "obscene" under § 847.001(10).[6]

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[6] To the extent Plaintiffs Amended Complaint encompasses an "as-applied" challenge to Defendant's use of the Florida RICO statute, the

(continued...)

Accordingly, Plaintiffs Motion for Summary Judgment (Dkt. 32) is **DENIED** and Defendant's Motion for Summary Judgment (Dkt. 44) is **GRANTED**. Any other pending motions are **DENIED** as moot. The Clerk is directed to enter final judgment in favor of Defendant and to close this case.

DONE AND ORDERED in chambers this 29th day of January, 2003.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

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[6] (...continued)
Court concludes that Defendant has carried his burden of justifying use of Florida's RICO Act in conjunction with Florida's obscenity law, consistent with the holding in *Fort Wayne Books. Inc. v. Indiana, supra*. Indeed, Plaintiff has made no showing that the facts in this record even support an as-applied challenge. Plaintiff has made no showing, either through evidence pertaining to him or those who have been prosecuted by Defendant in Polk County that Defendant has used or threatened to use the Florida RICO statute to dissuade, inhibit or prohibit the distribution of First Amendment protected materials. To the contrary, the record establishes that Defendant has utilized the RICO Act to prosecute only those individuals who have violated the underlying obscenity laws.

FLORIDA STATUTES

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.

(1)(a) Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing

mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

895.01 **Short Title.** Sections 895.01-895-06 shall be known as the "Florida RICO (Racketeer Influenced and Corrupt Organizations Act."

895.02 **Definitions.** As used in ss. 895.01-895.08, the term:

(1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

. . . 36. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

. . .

(3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal street

gang, as defined in s. 874.03, constitutes an enterprise.

(4) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

895.03 **Prohibited activities and defense.**

. . .

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

895.04 **Criminal penalties and alternative fine.**

(1) Any person convicted of engaging in activity in violation of the provisions of s. 895.03 is guilty of a felony

of the first degree and shall be punished as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of s. 895.0 3, through which the person derived pecuniary value, or by which he or she caused personal injury or property damage or other toss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

775.082 **Penalties . . .**

. . .

(3) A person who has been convicted of any other designated felony may be punished as follows:

. . .

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years . . .

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year.

Supreme Court, U.S.
FILED
APR - 9 2004
OFFICE OF THE CLERK

No. 03-1301

In The

Supreme Court of the United States

October Term, 2003

GREGORY BURRIS,
Petitioner,

vs.

JERRY HILL,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

Petitioner's introduction to his "Questions Presented" is not consistent with the facts found by the district court. That court found that the coupling of Florida's obscenity law with Florida's RICO Act did not unconstitutionally prevent the sale of non-obscene sexually explicit materials. The court also found that Petitioner failed to demonstrate any evidence of self-censorship of the sale or distribution of legally protected sexually explicit materials. Therefore, the Questions Presented should be reworded as follows:

I. Does the First Amendment permit the use of a state's RICO statute, in conjunction with a state's obscenity laws, to prosecute sellers of obscene materials?

II. Does a prosecutor, through a controlled buy of specific sexually explicit materials and by obtaining an independent judicial determination of probable cause, improperly act to establish contemporary community standards relating to obscenity for purposes of prosecution?

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STATEMENT OF THE CASE

Respondent Jerry Hill, as State Attorney for Florida's Tenth Judicial Circuit, is charged with upholding the laws of the State of Florida. Florida law prohibits the sale of obscene materials. § 847.011, Fla. Stat. Florida's RICO Act (Sections 895.01-895.06, Florida Statutes) provides that violations of § 847.011 are predicate acts, as set forth in § 895.02(1)(a)36, Fla. Stat. In accordance with this Court's ruling in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), Respondent routinely charges sellers of obscene materials with violations of § 847.011, Fla. Stat., and the Florida RICO Act.

Prior to bringing charges against a seller of sexually explicit materials, the materials are first purchased by law enforcement officers through a controlled buy procedure. After securing the sexually explicit materials, the Respondent presents those materials to a circuit judge for the purpose of obtaining a determination of probable cause in compliance with *Roaden v. Kentucky*, 413 U.S. 496 (1973). Once there has been an independent judicial determination of probable cause, Respondent then files the appropriate charges under Florida law. Pet. App. A. 10.

Individuals charged under this procedure have made the decision to resolve their respective cases prior to going to trial by entering into plea agreements. As part of those plea agreements, they have agreed to cease selling obscene materials in compliance with Florida law. Those owning real property upon which businesses were conducted in violation of § 847.011, Fla. Stat., have agreed to not use the property for the purposes of conducting the sale of obscene materials in the future. Pet. App. A.10-A.11.

The district court below, affirmed by the court of appeals, expressly found that Petitioner's argument--that he had self-

censored himself out of the business of selling videos because of the chilling effect created by enforcement of Florida's laws-- was simply not supported by the record. The court determined that only after a judge had made a threshold determination that the materials violated Florida's obscenity law did Respondent bring, or threaten to bring, formal charges under Florida's RICO Act. Pet. App. A.10. No evidence was presented below that an individual who sold only protected content materials was ever prosecuted or threatened with prosecution under Florida's RICO Act. Pet. App. A.10. The district court determined that those charged with serious crimes agreed to settle their cases as they, and their legal counsel, deemed appropriate. As noted by the district court, "[t]he concessions agreed to by those individuals, to the extent that they included restrictions on the sale of protected speech, are incidental to the plea bargaining process which was triggered not by threats of prosecution for distribution of protected speech but by criminal prosecution under Florida's obscenity and RICO laws." Pet. App. A.11. The district court and the court of appeals found that the Respondent properly pursued criminal prosecution under Florida's obscenity and RICO laws.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioner's arguments do not support a finding that the courts below misapplied this Court's ruling in *Miller v. California*, 413 U.S. 15 (1973). Rather, the petition is nothing more than an invitation for this Court to overturn the long-established rulings of *Miller* and *Fort Wayne Books*. Pet. at 12-13, fn. 6. Based upon his own concession below, Pet. App. A. 12, Petitioner is estopped from arguing that Florida's obscenity law does not comply with foundational law set forth in *Miller*. The court of appeals, and the district court before it, properly applied *Miller* and found that Florida's obscenity statute was not impermissibly vague, either on its face or as applied.

In order for this Court to grant certiorari, Petitioner must show that the court of appeals entered a decision that is in conflict with a decision of another court of appeals on the same important matter or decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. Rule 10(a) and 10(c). The petition fails to meet any of these criteria.

I. THE USE OF FLORIDA'S RICO ACT IN CONJUNCTION WITH FLORIDA'S OBSCENITY LAW IS IN STRICT COMPLIANCE WITH THE HOLDING OF THIS COURT IN *FORT WAYNE BOOKS, INC. v. INDIANA*, 489 U.S. 46 (1989), AND THE RECORD DOES NOT SUPPORT THE ASSERTION THAT PROTECTED SPEECH HAS BEEN CHILLED.

As this Court reasoned in *Fort Wayne Books*, there is no constitutional difference between the potential punishments for violation of obscenity laws and violation of RICO Acts. 489 U.S. at 59. The sum total of Petitioner's argument is that because Florida's RICO Act provides the potential for a greater number of years punishment than did the Indiana RICO Act, (thirty years vs. five years) this Court must now revisit its ruling in *Fort Wayne Books* and recede therefrom. However, Petitioner fails to grasp the reasoning of the Court in finding that there was no constitutional difference based on potential punishments.

Constitutional safeguards are observed when states adhere to the rulings of this Court in establishing their respective obscenity laws. Florida's obscenity laws adhere to the strict dictates of this Court as set forth in *Miller*. In fact, Petitioner conceded that point below. Pet. App. A.4. In sum, Petitioner has failed to demonstrate that the lower courts decided an important federal question in a way that conflicts with relevant decisions of

this Court and that would warrant a grant of certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE LOWER COURTS WERE NOT PRESENTED WITH THE QUESTION OF ESTABLISHMENT OF CONTEMPORARY COMMUNITY STANDARDS, AND THEREFORE THE ISSUE HAS NOT BEEN PRESERVED FOR REVIEW.

Petitioner attempts to raise before this Court an issue not directly raised before the lower courts: whether *Miller* provides a constitutional method to establish contemporary community standards. However, the single question of law presented by the Petitioner to the Eleventh Circuit Court of Appeals was:

> The Florida RICO Act Creates a Chilling Effect and Constitutes an Unlawful Prior Restraint on Protected Speech When Misdemeanor Violations of the Florida Obscenity Laws Are Used as Predicate Offenses.

Petitioner's Brief to the Eleventh Circuit. This point does not contend that one person–the Respondent Hill--determined the "community standards" for his circuit.

Petitioner argued below that he believed that the penalties of the Florida RICO Act created a chilling effect. He contended that the threatened severity of the penalty amounted to an unconstitutional prior restraint on protected expression when misdemeanor obscenity law violations were used as predicate offenses for RICO charges.

The district court found Petitioner's claim--that various words and phrases within the definitional language of the Florida obscenity statute are so vague that a video store proprietor could

not determine contemporary community standards without conducting an empirical study-- was without merit. The real attack then was upon *Miller* and its implied lack of proper definitional language, not upon the application of *Miller* by the lower courts.

Petitioner's action in the district court was a constitutional challenge to the use of Florida's RICO Act in conjunction with Florida's allegedly vague obscenity law. Petitioner claimed Florida's obscenity law was constitutionally vague on its face, thereby rendering Florida's use of its RICO Act unconstitutional when obscenity violations were used as predicate acts. R. App. A at A.1-A.7. The district court quickly disposed of that argument when Petitioner acknowledged the challenged statute's absolute conformity with the standards of *Miller*. Pet. App. A. 4. The court further considered the possibility that Petitioner meant to raise a constitutional challenge to the application of § 847.011, Fla. Stat. This was just as quickly disposed of by the court, which found that Respondent had complied with *Fort Wayne Books* and carried his burden of justifying use of Florida's RICO Act in conjunction with Florida's obscenity law. Pet. App. A. 12-13, fn. 6.

First Amendment protection does not extend to obscene materials. *Roth v. United States*, 354 U.S. 476 (1957). Florida's obscenity law, § 847.001(10), Fla. Stat., tracks directly the language required by *Miller*. As Petitioner acknowledged below, there has been no misapplication of *Miller*. Pet. App. A. 4. Now, however, Petitioner asks this Court to revisit and overturn *Miller* and *Fort Wayne Books*. Although Petitioner cites *Miller*, he is actually asking this Court to review the use of Florida's RICO Act in conjunction with Florida's obscenity law, a review more properly conducted under *Fort Wayne Books*. The intimidation factor complained of by Petitioner is not the result of Florida's obscenity law or the enforcement of that law; it is the use of violations of that law as predicates for Florida's RICO

Act that is at the heart of Petitioner's argument. Pet. at 3. Consequently, Petitioner's argument over jury review is not properly at issue.

As determined by the court of appeals, and the district court before it, Respondent properly used the existing Florida obscenity law to charge individuals selling or distributing obscene materials. The Petitioner, as noted by the district court's opinion, acknowledged that Florida's obscenity law undeniably comported with the long-established *Miller* test. Simply put, no application of *Miller* was required. The Petitioner did not challenge the obscenity law itself, necessarily including the establishment of a contemporary community standard. Instead, he challenged Respondent's application of the law by enforcement in conjunction with Florida's RICO Act. Petitioner's argument now falls squarely within the holding of *Fort Wayne Books*. Therefore, Petitioner's argument that the lower court misapplied *Miller* is erroneous and his petition should be denied.

III. PETITIONER DID NOT CHALLENGE THE DETERMINATION OF PROBABLE CAUSE IN THE LOWER COURTS.

As set forth in Section II above, Petitioner has failed to properly preserve the probable cause issue for review. In the interest of brevity, Respondent adopts those arguments set forth above in Section II. Respondent further argues that the petition should be denied because there is no need for a jury to establish a contemporary community standard before obscenity laws may be enforced.

When this Court decided *Roth*, a concern was raised that it would be difficult to establish a contemporary community standard "because juries may reach different conclusions as to

the same material," thereby rendering the statutes "insufficiently precise" to satisfy the requirements of due process. 354 U.S. at 491. This Court acknowledged that ". . .it is common experience that different juries may reach different results under any criminal statute." *Id.* at 492, n. 30. However, the Court went on to hold that: ". . .these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Id.* at 492. That is the case at bar. Petitioner is given adequate notice of what sexually explicit materials are prohibited under Florida's obscenity law without a predetermination by a jury that any particular sexually explicit material is obscene under a pre-established contemporary community standard.

The contemporary community standard, as envisioned by the holdings of this Court, is based upon the reasonable person objective standard. Again, in *Roth*, expressing concern about the proper standards for judging obscenity, this Court found that the boundaries must be sufficiently distinct for judges and juries to fairly administer the law. 354 U.S. at 491-492 (quoting *United States v. Petrillo*, 332 U.S. 1 (1947)). Those boundaries were more firmly set in *Miller*. When called upon by Respondent to render a determination of probable cause for suspected obscene materials, the trial judges in the state's circuit court adhered to those boundaries through application of the standards set forth in Florida's obscenity law. Only after a determination of probable cause under the *Miller* standards was a criminal information or indictment filed. Moreover, even when sexually explicit materials are presented to juries, it is possible that different verdicts could be reached based upon the composition of the jury itself. How then would Plaintiff have any better idea how to comply with Florida's obscenity law than he was afforded by the *Miller* language contained within the law itself?

Importantly, the *Miller* language contained within Florida's obscenity law must also guide law enforcement when determining if any particular sexually explicit material has crossed the line between acceptable adult-oriented sexual materials and unacceptable obscenity. If, as Petitioner suggests, it is first necessary to establish a firm contemporary community standard by determination of a jury, state law enforcement would be prohibited from using the law itself. The first case would therefore never reach a jury. Each time an individual was charged with a violation of the law, he could claim he did not know the sexually explicit materials he sold or distributed were obscene because no jury had found them to be unacceptable under contemporary community standards.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Civil Action, Case Number _____

GREGORY BURRIS, d/b/a Video Plus,	)
	)
Plaintiff,	)
	)
	)
v.	)**PLAINTIFF'S COMPLAINT**
	)**FOR DECLARATORY**
JERRY HILL, State Attorney for the Tenth Judicial Circuit of Florida,	)**JUDGMENT AND**
	)**PERMANENT INJUNCTION**
	)
	)
	)
Defendant.	)
	)
_____	)

Plaintiff, **GREGORY BURRIS,** sues Defendant, **JERRY HILL,** for a judgment declaring that Florida's Racketeer Influenced and Corrupt Organizations Act (RICO) (F.S. Chpt. 895) when used in conjunction with Florida's obscenity statute (F.S. Chpt. 847) creates a chilling effect and an unconstitutional prior restraint on protected speech, and Plaintiff seeks an injunction permanently enjoining Defendant from enforcing the Florida RICO Act against him when obscenity is alleged as the predicate offense.

PARTIES

1. Plaintiff GREGORY BURRIS (hereinafter "BURRIS") is a citizen of the United States who owns and operates a retail video tape sales and rental business at 1938 East Main Street in Lakeland, Polk County, Florida.

2. Defendant JERRY HILL (hereinafter "HILL") is the duly elected state attorney for the tenth judicial circuit of Florida and is charged with prosecuting violations of Florida law in said circuit, which includes Lakeland, Polk County, Florida.

JURISDICTION

3. This action is brought pursuant to Title 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon Title 28 U.S.C. § 1341(3) and (4) and the aforesaid statutory and constitutional provisions. This Court has the authority to issue declaratory judgments and permanent injunctions pursuant to Title 28 U.S.C. §§ 2201 and 2202.

VENUE

4. All of the acts alleged in this Complaint have occurred and continue to occur in Lakeland, Polk County, Florida, within the Middle District of Florida, Tampa Division.

FACTS AND CHALLENGES

5. On or about November 1, 1998, BURRIS began operating a retail video tape sales and rental business in Lakeland, Polk County, Florida.

6. As a part of his business operation, BURRIS wishes to sell and rent a small number of sexually oriented, non-obscene

video tapes, but not a large enough number to bring BURRIS's business operation within the definition of the term "adult bookstore" as it is defined in the Lakeland Comprehensive Adult Use Regulation Ordinance.

7. Although BURRIS wishes to sell and rent a small number of sexually oriented, non-obscene video tapes, he has refrained from doing so because he is afraid that HILL will file criminal charges against him for violating the Florida RICO Act (F.S. Chpt. 895) as it applies to obscenity (F.S. Chpt. 847).

8. A violation of Florida's RICO Act constitutes a first degree felony which carries a maximum sentence of thirty (30) years imprisonment and a maximum fine of ten thousand dollars ($10,000.00).

9. Although the Florida Supreme Court has ruled that the Florida obscenity law is not unconstitutionally vague, it is nonetheless inherently vague and difficult to comprehend, and it does not contain a meaningful scienter requirement.

10. During the past few years, HILL and/or his predecessor have filed charges against numerous owners and employees of adult-oriented businesses for violating the Florida RICO Act wherein obscenity was used as the predicate offense upon which the RICO charge was based.

11. Typically, HILL has charged said individuals with violating the Florida RICO Act as it applies to obscenity .and also with conspiring to violate said Act so that the maximum sentence is sixty (60) years imprisonment and the maximum fine is Twenty Thousand Dollars ($20,000.00).

12. A search warrant is ordinarily executed on the adult business premises and the owner's computer equipment, cash register and business records are seized, thereby effectively

closing the business.

13. Because a RICO violation constitutes a first degree felony, the bail with which the owners and employees of adult businesses are initially confronted is always high, and sometimes as high as $200,000.00 when HILL charges them with RICO violations based on obscenity.

14. Although the terms vary, HILL offers said owners and employees a plea bargain which typically consists of HILL'S agreeing to dismiss or greatly reduce the RICO charges if the owners and employees agree to the following:

(a) Permanently close the adult-oriented business and remove all signs relating to its existence;

(b) record a deed restriction in the county's property records restricting the business property from ever again being used for an adult oriented use (if the business owner is also the property owner);

(c) never again be associated with any sexually oriented business within the Tenth Judicial Circuit of Florida; and

(d) pay a fine and/or court costs and/or the costs of the investigation that led to the RICO charges.

15. In all cases of which BURRIS is aware, the owners of adult-oriented business who were charged with violating the Florida RICO Act wherein obscenity was used as the predicate offense have all agreed to close their businesses rather than face the Act's severe penalties.

16. When obscenity is used as the predicate offense, the use of the Florida RICO Act to prosecute owners of adult-oriented businesses has a chilling effect and constitutes an

unlawful prior restraint on presumptively protected expression because when faced with the severity of the Florida RICO Act and the inherent vagueness of the Florida obscenity law, coupled with HILL's offer of dismissal or charge reduction as described above, few, if any, individuals will contest the charges.

17. The severity of the Florida RICO Act's penalties coupled with the inherent vagueness of the Florida obscenity law and the traditional willingness of HILL to use the RICO Act against adult-oriented businesses has caused BURRIS to be afraid to sell or rent sexually oriented video tapes.

18. The severity of the Florida RICO Act's penalties coupled with the inherent vagueness of the Florida obscenity law and the aforesaid actions of HILL have deprived and continue to deprive BURRIS and his patrons and the public at large of rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

19. All of the actions of HILL have been and continue to be under color of state law or authority.

COUNT ONE - DECLARATORY JUDGMENT

20. BURRIS realleges each and every allegation set forth in paragraphs 1-19 of this complaint and incorporates them therein by reference.

21. BURRIS is uncertain as to his rights under the First and Fourteenth Amendments to the United States Constitution as those rights will be affected by HILL's enforcement against BURRIS of the Florida RICO Act in conjunction with the Florida obscenity law.

22. There is a substantial and actual justiciable controvery over BURRIS's right under the First and Fourteenth

Amendments to the United States Constitution as those rights will be affected by HILL's enforcement against BURRIS of the Florida RICO Act in conjunction with the Florida obscenity law.

23. BURRIS is entitled to a judgment declaring the constitutionality of the Florida RICO Act when used in conjunction with the Florida obscenity law.

WHEREFORE, BURRIS requests that this Court grant him the following relief:

A. Issue a judgment declaring that the enforcement of the Florida RICO Act when obscenity is used as the predicate offense has a chilling effect and constitutes an unlawful prior restraint on protected expression in violation of the First and Fourteenth Amendments to the United States Constitution.

B. Award to BURRIS all reasonable costs of this action, including attorneys' fees pursuant to Title 42 U.S.C. § 1988.

C. Any other relief in law or in equity to which BURRIS may be entitled.

COUNT TWO - PERMANENT INJUNCTION

24. BURRIS realleges each and every allegation set forth in paragraphs 1-19 of this complaint and incorporates them herein by reference.

25. BURRIS has a clear legal right to sell and rent sexually oriented, non-obscene video tapes to his customers and this right is protected by the First and Fourteenth Amendments to the United States Constitution.

26. BURRIS and his agents, employees and the public at large will suffer irreparable injury if this Court does not issue an

injunction enjoining HILL from enforcing against BURRIS The Florida RICO Act when Florida obscenity law is used as the predicate offense.

27. BURRIS has no adequate remedy at law because he is being deprived of his First Amendment rights, and in such cases, damages are both inadequate and unascertainable.

28. The entry of a permanent injunction against HILL will serve the public interest by prohibiting the application of an unconstitutional law which interferes with the public's rights under the First Amendment.

WHEREFORE, BURRIS requests that this Court grant him the following relief:

A. Issue a permanent injunction against HILL forever prohibiting him from enforcing against BURRIS the Florida RICO Act when obscenity is used as the predicate offense.

B. Award to BURRIS all reasonable costs of this action, including attorneys' fees pursuant to 42 U.S.C. § 1988.

C. Any other relief in law or in equity to which BURRIS may be entitled.

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(2)

No. 03-1301

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In the Supreme Court of the United States

GREGORY BURRIS,

Petitioner,

vs.

JERRY HILL,

Respondent .

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

State Attorney Jerry Hill tells this Court in his Brief in Opposition that there should be no concern about wholesale, systemic censorship in three Florida counties. Hill has the temerity to make the claim that "the record does not support the assertion that protected speech has been chilled."[1] Yet he fails to explain why a trial court record replete with many specific examples of massive self-censorship does not clearly demonstrate that presumptively protected speech has been irreparably chilled.[2] If Hill's position is legally correct, this Court's statements in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) about self-censorship were a waste of ink.[3] If this case does not establish self-censorship of a constitutional magnitude, and the ultimate transfer of the determination of contemporary community standards from the citizens of a jurisdiction to the prosecutorial arm of the government, no such case can ever be made.

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[1] Respondent's Brief in Opposition, at 3.

[2] Hill erroneously claims that he never prosecuted or threatened to prosecute anyone for selling "protected content materials." He fails to acknowledge that the materials that were the subject of his many RICO prosecutions *were* presumptively protected expression, *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), and remained so unless and until "the trier of fact", *Miller v. California*, 413 U.S. 15, 24 (1973), determined otherwise. Thus, *everyone* who was targeted for closure, using RICO as the weapon, was prosecuted for selling presumptively protected materials of a sexual nature.

[3] As argued in the Petition, this Court rejected the self-censorship argument of Fort Wayne Books, Inc. because there was only an assertion of possible self-censorship. This case presents the situation where self-censorship was overwhelmingly established.

REASON FOR GRANTING THE WRIT

Mr. Hill does not contest the claim by Greg Burris that sexually explicit material has been totally removed from three Florida counties. Hundreds of thousands of Florida citizens have no opportunity to establish their own community standards for sexually explicit material. Mr. Hill is, to use a rather trite phrase, "the judge, jury and executioner" when it comes to the availability of such material in his three-county circuit. Unless this Court holds that the states *may not* make obscenity a predicate offense for RICO prosecutions, contemporary community standards will be determined by the government, and not by the people.

I. THE SOLE ISSUE IN THE PETITION WAS ALSO THE SOLE ISSUE IN THE TRIAL COURT AND THE COURT OF APPEALS.

According to Mr. Hill, "the lower courts were not presented with the question of establishment of contemporary community standards, and therefore the issue has not been preserved for review."[4] This, Mr. Hill tells us, is reason to deny the Petition.

Even a cursory reading of the trial court record establishes that Mr. Burris filed this lawsuit *for the sole purpose* of establishing that the irresponsible use of obscenity charges as RICO predicate acts causes a chilling effect. No person so charged, facing the possibility of the draconian consequences of a RICO conviction, would take his case to a jury.

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[4] Respondent's Brief in Opposition, at 4.

But what if one or more of those cases had gone to trial? As required, the trial judge would have to explain to the jury that the materials had to be judged under the *Miller* test. And the very first task of the trial jury would be to determine the contemporary community standards. Yet as a direct and foreseeable by-product of Mr. Hill's censorship campaign, how would a jury do that? The fact is that those jurors would have to guess, and no one would risk many years in a state prison on the hope that the jurors would guess right.

The issue of contemporary community standards *was* presented to both courts below. It was clearly included within the *argument* presented below, and is an argument in this Court. It is part and parcel of Burris' entire claim, and he is entitled to repeat that argument here.

II. PROBABLE CAUSE FINDINGS IN THE MANY CASES EXAMINED IN THE TRIAL COURT RECORD ARE NOT THE EQUIVALENT OF A DETERMINATION OF OBSCENITY.

Hill makes the statement that "Petitioner did not challenge the determination of probable cause in the lower courts."[5] One wonders how Burris might have done that.

Probable cause determinations are not adversarial. The State does not send a "notice of hearing" to the attorney for the target of its obscenity investigation, advising him or her of an adversary proceeding to

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[5] Brief in Opposition, at 6.

determine whether a particular videotape is "probably" obscene. A probable cause determination is, by its very nature, an *ex parte* process. The State gets to select which judge makes the determination. There is no record of any kind, no notes, no transcripts, nothing to later review. There is no prohibition against conversations between the reviewing judge and the investigating police officer (or, for that matter, the prosecuting attorney) concerning what the *officer or prosecutor* believes the contemporary community standards are. No one could ever establish that the reviewing judge "focus[ed] searchingly on the question of obscenity," *Roaden v. Kentucky*, 413 U.S. at 502. Hill's argument that somehow those nonadversarial, *ex parte* findings should be given any more credence than any probable cause finding simply ignores decades of obscenity jurisprudence, and marginalizes the role of the community in making the ultimate judgments on the acceptability of the materials involved.

There is a simple explanation for Hill's argument about this alleged "failure" to challenge the probable findings in the dozen or so RICO prosecutions in the trial court record. Hill wants this Court to accept his claim that there need not be any contemporary community standards so long as the *technical* requirement of a judicial determination of probable cause is met. But when RICO is involved, the probable cause finding becomes, *de facto* the ultimate determination of obscenity *vel non*. It is not the non-adversarial probable cause proceeding that is the problem. It is the use of RICO by a prosecutor determined (for whatever reason, personal, political, religious or otherwise), to eliminate access to sexually explicit materials from his jurisdiction that is the problem.

CONCLUSION

This is a critically important case, not only for Gregory Burris but for all Americans who wish to sell sexually explicit materials that are presumptively protected by the First Amendment. Burris and quite a few others have been quite forcefully dissuaded from selling adult materials in three Florida counties.[6] It follows, of course, that when the government can prevent the sale of a product, the product is less available in the marketplace . . . or not available at all!

The Court should note that the criminal prosecutions included in the Record were not against "organized crime," as that term was understood by the Congress when it first enacted the federal RICO statute.[7] These RICO prosecutions – and the threats of long prison sentences – were against "mom and pop" stores, small retail outlets carrying adult videotapes and magazines. This is an abuse of the RICO statute, and as enormous a chilling effect as could be imagined. If Jerry Hill can prevent the sale or rental of *all* sexually explicit material – obscene *and not obscene* – from three Florida counties, any other prosecutor can do the same. Whether for personal, religious, political or other reasons, no prosecuting attorney can be allowed to decide *by himself* what the contemporary standards of any community are. *Miller* never contemplated such a thing.

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[6] It would not be possible to ever know how many others were similarly persuaded to "open up elsewhere" because of Hill's well-publicized RICO tactic.

[7] Florida's RICO statute is a virtual carbon copy of the federal statute.

The Court should grant the Petition, so it can now decide the unanswered question in *Fort Wayne Books*: whether the use of obscenity offenses as predicate acts for RICO prosecutions has an unconstitutional chilling effect on freedom of sexual expression.

Respectfully submitted,

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